

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH M. DICKERSON and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Atlantic City, NJ

*Docket No. 99-57; Submitted on the Record;
Issued April 4, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's entitlement to compensation benefits effective July 23, 1996; (2) whether appellant has established that she had continuing disability after July 23, 1996 causally related to her accepted employment injury; and (3) whether appellant has established that she has a permanent impairment of her upper extremities which would entitle her to a schedule award.

On January 12, 1993 appellant, then a 35-year-old lead accounting technician, filed an occupational disease claim alleging that she sustained bilateral carpal tunnel syndrome due to factors of her federal employment. She stopped work on December 11, 1992 and did not return.

By decision dated August 10, 1993, the Office denied appellant's claim on the grounds that she did not establish fact of injury. In a decision dated January 28, 1994, the Office denied appellant's request for a hearing as untimely and, in a decision dated April 12, 1994, the Office denied modification of its prior merit decision. In a letter dated July 15, 1994, appellant again requested reconsideration of her claim. By decision dated September 26, 1994, the Office vacated its August 10, 1993 decision. The Office accepted her claim for bilateral carpal tunnel syndrome and authorized a December 16, 1992 decompression surgery for right carpal tunnel syndrome.

The record indicates that appellant retired on disability effective March 8, 1993. In a letter dated October 28, 1994, she, through her representative, indicated that she wished to elect benefits under the Federal Employees' Compensation Act.¹

By decision dated July 23, 1996, the Office terminated appellant's entitlement to compensation and medical benefits on the grounds that she had no residual condition or disability causally related to her accepted employment injury. The Office further found that she

¹ 5 U.S.C. §§ 8101-8193.

was not entitled to a schedule award as she had no permanent impairment due to her employment injury.

Appellant requested a hearing before an Office hearing representative, which was held on February 11, 1997. In a decision dated April 10, 1997 and finalized April 11, 1997, the hearing representative affirmed the Office's July 23, 1996 decision.

By letter dated March 12, 1998, appellant, through her representative, requested reconsideration of the termination of her benefits and the denial of her claim for a schedule award. In a decision dated June 12, 1998, the Office denied modification of its prior decision.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not meet its burden of proof to terminate appellant's entitlement to compensation benefits effective July 23, 1996.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

The Office based its termination of appellant's compensation on the report of Dr. Allen Berkowitz, a Board-certified orthopedic surgeon who provided a second opinion evaluation. In a report dated November 9, 1995, he discussed appellant's history of injury and the medical treatment she received, including the December 1992 surgery on her right wrist. On physical examination Dr. Berkowitz noted "mild diffuse tenderness" of the wrist and stated:

"There is good strength throughout the upper extremity. There is no thenar or intrinsic muscle weakness or atrophy. There is a Tinel's sign over the median nerve at the wrist and the Phalen's test is positive. There was also a Tinel's sign over the median nerve in the proximal forearm, but there is no tenderness along the median nerve in the proximal forearm. All provocative testing for a pronator syndrome is negative. There is a Tinel's sign over the ulnar nerve at the wrist and elbow but the elbow flexion test is negative."

Dr. Berkowitz diagnosed recurrent right carpal tunnel syndrome and left carpal tunnel syndrome and recommended electrodiagnostic testing. He further opined that appellant's chronic

² *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

³ *Id.*

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

venous insufficiency of the lower extremities was not related to her employment or carpal tunnel syndrome.⁵

Appellant underwent an electromyography (EMG) and nerve conduction study on November 21, 1995, which revealed “a very mild degree of neurpraxia right median nerve at the wrist, [n]o frank carpal tunnel syndrome on either side, [and] [n]o other entrapment and no cervical radiculopathy.”

In a follow-up report dated November 16, 1995, Dr. Berkowitz noted that the EMG revealed “no evidence for a recurrent right carpal tunnel syndrome or a left carpal tunnel syndrome.” He diagnosed bilateral hand pain of undetermined etiology and found that appellant had no objective evidence of disability in her upper extremities. Dr. Berkowitz found that appellant could resume her prior employment but stated, “[I]t may be helpful for [appellant] to have occasional breaks from data entry functions and perhaps minimiz[e] data entry functions.” He noted, however, that any problems appellant had performing her employment duties resulted from subjective complaints unsupported by objective findings. In a work restriction evaluation (OWCP-5c) dated April 10, 1996, Dr. Berkowitz found that appellant could work with breaks from data entry and indicated that the listed restrictions were due to carpal tunnel syndrome.

In a report dated December 22, 1995, an Office medical adviser opined that, based on Dr. Berkowitz’s reports, appellant’s bilateral carpal tunnel syndrome had resolved and she had no permanent impairment which would entitle her to a schedule award.

The Board has carefully reviewed the opinion of Dr. Berkowitz and finds that it does not have sufficient reliability, probative value and convincing quality with respect to the conclusions reached regarding whether appellant had any residual condition or disability due to her accepted employment injury of bilateral carpal tunnel syndrome. He initially diagnosed recurrent carpal tunnel syndrome on the right and carpal tunnel syndrome on the left and noted that appellant had a positive Tinel’s sign and Phalen’s test over the wrist. Dr. Berkowitz referred appellant for an EMG, which was negative for carpal tunnel syndrome. In a report dated November 9, 1995, he found that, based on the EMG results, appellant had no further objective evidence of her accepted employment injury. Dr. Berkowitz, however, did not explain his conclusion that appellant had no evidence of her accepted employment injury in view of the positive objective findings of carpal tunnel syndrome in the November 9, 1995 physical examination. Further, in Dr. Berkowitz’s November 16, 1995 report, he noted that if appellant could not perform her employment duties it would be solely due to subjective complaints; however, in his April 10, 1996 work restriction evaluation, Dr. Berkowitz found that appellant required breaks from data entry and indicated that the listed restriction was due to carpal tunnel syndrome. He did not provide medical rationale explaining the differences in his reports. Thus, Dr. Berkowitz’s opinion is not sufficient to meet the Office’s burden of proof to terminate appellant’s compensation benefits and authorization for medical treatment effective July 23, 1996.

⁵ The Office accepted that appellant sustained an aggravation of venus obstruction due to an injury on August 16, 1991. The case is assigned Office file number A2-637020.

In view of the Board's finding regarding the Office's termination of compensation, the issue of whether appellant has established that she had continuing disability after July 23, 1996 causally related to her accepted employment injury is moot. Regarding appellant's claim for a schedule award, the Office based its finding that she had no permanent impairment due to her bilateral carpal tunnel syndrome at least in part on Dr. Berkowitz's opinion, which the Board has found insufficient to establish that appellant has no residuals of her employment injury. Therefore, the case is remanded for further development on the issue of whether appellant has a permanent impairment due to her accepted employment injury which would warrant a schedule award.

The decision of the Office of Workers' Compensation Programs dated June 12, 1998 is reversed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, D.C.
April 4, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member